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OKLAHOMA }
CLEVELAND COUNTY } S.S.
FILED

MAR 05 2019

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

Case No. CJ-2017-816

Judge Thad Balkman

William C. Hetherington
Special Discovery Master

CONFIDENTIAL
EXHIBITS A & B
FILED UNDER SEAL
PURSUANT TO
PROTECTIVE ORDER
DATED APRIL 16, 2018

DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND
JOHNSON'S OPPOSITION TO THE STATE'S MOTION FOR DE-DESIGNATION

EXHIBITS A & B SEALED PER COURT ORDER
DATED APRIL 16, 2018,
THAD BALKMAN DISTRICT JUDGE

-CONFIDENTIAL-
TO BE FILED ONLY UNDER SEAL

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

vs.

- (1) PURDUE PHARMA L.P.;
- (2) PURDUE PHARMA, INC.;
- (3) THE PURDUE FREDERICK COMPANY;
- (4) TEVA PHARMACEUTICALS
USA, INC.;
- (5) CEPHALON, INC.;
- (6) JOHNSON & JOHNSON;
- (7) JANSSEN PHARMACEUTICALS, INC.;
- (8) ORTHO-McNEIL-JANSSEN
PHARMACEUTICALS, INC., n/k/a
JANSSEN PHARMACEUTICALS, INC.;
- (9) JANSSEN PHARMACEUTICA, INC.,
n/k/a JANSSEN PHARMACEUTICALS,
INC.;
- (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,
f/k/a ACTAVIS, INC., f/k/a WATSON
PHARMACEUTICALS, INC.;
- (11) WATSON LABORATORIES, INC.;
- (12) ACTAVIS LLC; and
- (13) ACTAVIS PHARMA, INC.,
f/k/a WATSON PHARMA, INC.,

Defendants.

Case No. CJ-2017-816

Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

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**DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND
JOHNSON'S OPPOSITION TO THE STATE'S MOTION FOR DE-DESIGNATION**

The State seems to be under the impression that it is immune from the Court's orders in this case. At least, that is the only conclusion that can be drawn from the State's latest motion. Ignoring this Court's prior rulings and circumventing the Court's mandatory de-designation procedures, the State has moved to immediately disclose *every* confidential document Janssen has produced in this litigation. It is not as if the Court has not settled this issue; it has. The State has just chosen to ignore it.

The State's declared reasons for making this request are nakedly pretextual: Although the State purports to carry the banner of the President of the United States and the Oklahoma Legislature, its not-so-concealed goal in bringing this motion is to batter Oklahomans with sensationalistic headlines and to poison potential jurors against Janssen in advance of trial. The State's eagerness to try this case in the media only underscores why this Court's prior confidentiality rulings were correct. Of course, “[t]he public … deserves to know” the truth about this litigation. (Mot. at 4.) But Due Process requires that the public learn that truth through the orderly presentation of evidence and argument at a fair trial—not through calculated media campaigns or dumps of confidential documents, ripe for misinterpretation. The State will have its day in Court. Its motion to litigate its case in the press should be denied.

The State's motion is meritless even apart from its improper objective to taint the jury pool. For one, the motion violates this Court's Amended Protective Order. Instead of meeting and conferring with Janssen, as the order requires, the State has come directly to the Court. And rather than identify the specific materials it feels should not remain confidential, the State has pointed to four documents and asked to strip protection from *everything* Janssen has produced in discovery. If the State believes there are documents that have been mistakenly designated as confidential, it should follow the Court's protective order and meet and confer with Janssen about them. The State's blatant violation of that protocol warrants denial of its motion.

Procedure aside, the State offers no reason to de-designate *any* materials. The four excerpts it has plucked *do* contain confidential commercial information—indeed, the Court has already found similar documents protected for that very reason. The Court has likewise already rejected the State's argument that Janssen forfeited any confidentiality interest when it sold several opioid businesses in 2016. The only thing that has changed since the Court made that ruling is that the

State has identified materials it believes will inflame public opinion. But that is no reason to depart from that earlier ruling. To the contrary, it confirms the importance of continuing to prevent the State from strategically disclosing Janssen's confidential commercial information.

The State's motion to launch a media campaign to bias the jury pool should be denied in its entirety.

ARGUMENT

The State's motion is an undisguised attempt to generate pretrial publicity to influence public opinion and taint the jury pool. But even if the motion advanced a legitimate purpose, it would still fail because (1) it violates this Court's prescribed de-designation procedure, and (2) it offers no reason to de-designate every document Janssen has produced in discovery—indeed, it does not identify a single non-confidential document.

1. The Motion Should Be Denied Because It Violates The Amended Protective Order

It is well-settled in Oklahoma that “the production of sensitive documents should be allowed in the least intrusive manner.” *YWCA of Oklahoma City v. Melson*, 1997 OK 81, 944 P.2d 304, 312 n.45. The Amended Protective Order honors this principle by allowing the parties to designate certain categories of documents as confidential. Amended Protective Order (“APO”) §§ 2, 4. One of those categories is “confidential research, development or commercial information,” APO § 2, which is separately protected under Oklahoma law. 12 O.S. § 3226(C)(1)(g) (authorizing district court to order “that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way”). The Amended Protective Order also specifies procedures the parties *must* use to challenge confidentiality designations. *Id.* § 14. The party challenging a confidentiality designation “must begin the process by conferring directly with [designating] counsel” and must not only “explain

the basis for its belief that the confidentiality designation was not proper" but also "identify the specific information that it believes is not confidential." *Id.* § 14(a), (b).

The State has done neither, and its motion flagrantly violates these requirements. The State made no effort to meet and confer before filing its motion. And instead of identifying specific information that is not confidential, the State has tabbed portions of four documents and implied that, because they happen to be inflammatory when taken out of context, neither they nor any other document Janssen has produced can possibly be considered confidential.

Like any other litigant, the State must satisfy court orders. If it had qualms with a particular confidentiality designation, it was obligated to follow the Amended Protective Order by meeting and conferring about the relevant document. It did not, and its motion should be denied for that reason alone.

2. The Only Designations The State Does Identify Are Entitled To Confidential Treatment

Even if the State's motion were proper, it still fails because it does not identify *a single* document that was improperly designated. Three of the State's four documents are excerpts of materials detailing confidential marketing analyses (Mot., Exs. 2–3) and draft business strategies (*Id.*, Ex. 4). *See* Mot., Exs. 2–4. Oklahoma courts have treated such information as confidential. *See Online Oil, Inc. v CO&G Production Group, LLC*, 2015 WL 13694638, at *2 (Okl. Dist. July 30, 2015) (finding information concerning the inter-relation of entities along with strategies and business models confidential). Courts across the country have consistently permitted similar documents to be produced as confidential even in connection with dispositive court filings. *See, e.g., Conn Credit I, LP v. TF Loan Co. III, LLC*, 2016 WL 8231153, at *1 (E.D. Tex. May 9, 2016) (sealing documents that "contain[ed] a large amount of confidential business information" filed in

support of summary judgment); *SMD Software, Inc. v. EMove, Inc.*, 2013 WL 1091054, at *3 (E.D.N.C. Mar. 15, 2013) (ordering that documents containing “marketing strategies” be maintained under seal).

The fourth document is an excerpt from a risk-benefit assessment prepared for Janssen for purposes of product development, which contains proprietary research and commercial information. *See* Ex. A & Mot., Ex. 5.¹ Courts routinely permit such research to be treated as confidential. *See, e.g., Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999) (“Documents falling into categories commonly sealed are those containing trade secrets, confidential research and development information, marketing plans, revenue information, pricing information, and the like.”). Each document is therefore entitled to protection under the Amended Protective Order and Oklahoma law. *See* APO § 2 (defining “confidential research, development, and commercial information” as “Confidential”); 12 O.S. § 3226(C)(1)(g) (extending protection to same).

In fact, the Court has already concluded that documents containing similar information are entitled to protection under the Amended Protective Order. *See* 12/26/18 Order at 4. In its last order addressing de-designation, the Court found that Exhibits 17, 18, and 25 to Janssen’s motion were confidential because they set forth business strategies, marketing targets and strategies, and confidential research information. Exhibits 2–5 contain the same type of information, and so they merit the same treatment.

Apparently recognizing that the documents *do* contain confidential information, the State advances two blanket justifications for de-designating all of Janssen’s documents. First, it

¹ A full and complete copy of Exhibit 5 to the State’s Motion is attached hereto as Exhibit A.

contends that because Janssen divested the bulk of its opioid business in 2016, it can no longer claim a confidentiality interest in the documents. The State has already made that argument. *See* 12/18/2018 Opp. at 3-4. And this Court rejected it when it held that pre-2016 documents containing confidential business information were entitled to confidential treatment. *See* 12/26/18 Order at 4. As that ruling recognized, the purchasers of Janssen's opioids businesses have a continuing interest in what is now their confidential commercial material. And Janssen owes those purchasers a contractual duty to safeguard that interest: The agreement governing the sale of its Nucynta product line, for example, *requires* Janssen to "keep confidential and not disclose to any third party" the confidential information belonging to the businesses it divested. Ex. B (§§ 1.01, 6.26). Again, this Court has already recognized this. *See* 12/26/18 Order at 4. The State cites no compelling reason to depart from that ruling.

Second, the State contends that de-designation is warranted to help the President and state legislature address opioid abuse. Mot. at 16-17. But speculating about the needs of absent third parties is no rationale for *the State* to de-designate anything. The President and the Oklahoma Legislature have ample authority and resources to investigate, obtain information, and make policy about opioid use. The State, as a party to this lawsuit, is in no position to demand the de-designation of a mountain of confidential documents just to accommodate an intentionally prejudicial media strategy in the months leading up to trial.²

Policymakers and citizens of Oklahoma will hear a complete story at trial: "A trial is a search for the truth." *Matter of Estate of Lambe*, 1985 OK CIV APP 38, 710 P.2d 772, 776.

² The cases relied upon by the State, *Collier v. Reese*, 2009 OK 86, ¶ 18, 223 P.3d 966, 974 and *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997), did not address confidential commercial information, nor was confidentiality governed in those cases by a preexisting, stipulated protective order.

Interested parties will then have an opportunity to evaluate evidence and decide what to believe. In the meantime, the Court should not permit the State to corrupt the jury pool by improperly designating confidential documents *en masse* as part of an effort to try this case before the Court even comes to order.

CONCLUSION

For the foregoing reasons, the Court should deny the State's motion to de-designate in its entirety.

Respectfully submitted,



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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on March 5, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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